between the *Edling Case* and the others. In that case, defendant had recognized a duty to protect the area in which plaintiff sat but had negligently allowed the secreen to become defective. In this connection the words of Montague Smith, J. in *Crafter* v. *Metropolitan Railway Company,* L. R. 1 C. P. *304 are in point. He says, "The line must be drawn * * * between suggestions of possible precautions and evidence of actual negligence such as ought to reasonably and properly be left to a jury."

The cases all agree that defendant is not an insurer of plaintiff's safety and is therefore under no duty to screen the whole stand. They are equally well agreed that defendant is under a duty to provide some protection against the dangers of the game even as to those who attend with full knowledge of these dangers. The test applied in the *Crane Case* imposing an obligation to afford a choice of protected or exposed seats is no doubt of some value as evidence in deciding in a given case whether or not plaintiff in choosing an exposed seat assumed the risk of being hit. As a criterion for determining the extent of the area defendant is duty-bound to screen, it has no merit. On one occasion a small attendance may find ample room behind a very limited screen, while on others with a capacity audience, the defendant would be bound to screen all the seats if those attending were to have an opportunity of occupying protected seats. On the one hand, a strict application of the doctrine of assumption of risk would preclude a recovery in a majority of instances where plaintiff knew the dangers incident to the game. On the other hand, denying its applicability to such cases as these would tend to throw the entire burden on the defendant. Experience has shown that the sections of the stand directly behind the batter, and for a distance along the first and third base lines to be those exposed to the greatest danger. It is the occupants of these seats who are most apt to feel the driving effect of a pitched ball deviated from its course by glancing off the bat. In imposing an absolute duty on the baseball association to protect its patrons against this danger, the courts will have fixed the relative rights and liabilities of the parties in a manner consistent with legal theory and practical application.

A. B. T.

ENEMY ALIEN LITIGANTS IN THE ENGLISH LAW.—It is said that as a general rule an enemy alien cannot bring an action in the English courts. "And true it is, that an Alien enemie, shall maintaine neither reall nor personall action, *Donec terrae fuet' communes,* that is untill both Nations be in peace." COKE ON LITTLETON, (2 ed.) L. 2, c. 11, sec. 198. LORD STOWELL'S famous dictum in *The Hoop* (1799), 1 C. Rob. 196, 200, is regarded as a classical statement of the doctrine: "In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in judicio.* The peculiar law of our own country applies this principle with great rigour.—The same principle is received in our courts of the law of nations; they are so far *British* courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass,

or some other act of public authority that puts him in the *King's* peace *pro hâc vice.*" Perhaps the most useful recent discussion of the law on this question is to be found in the opinion of LORD CHIEF JUSTICE READING in *Porter* v. *Freudenberg* [1915], 1 K. B. 857, 866. There is an exhaustive review of the authorities in *Rodriguez* v. *Speyer Brothers* (1918), 88 L. J. K. B. 147, discussed *infra.* See also 16 MICH. L. REV. 621. For a comparative study of the law and practice of different countries, see GARNER, "TREATMENT OF ENEMY ALIENS," 13 AM. JOUR. OF INT. LAW 22-59.

The general rule has been deprived of much of its original significance by the progressive tendency of the courts to mitigate the harshness of its application. It is applied, for example, only to parties plaintiff. An enemy alien may be sued as a defendant, and when sued he has a right to enter an appearance and defend the action. *Robinson & Co.* v. *Continental Insurance Company of Mannheim* [1915], 1 K. B. 155. If the decision goes against him he has a right to appeal. *Porter* v. *Freudenberg, supra.* As applied to parties plaintiff the principle is qualified by many important exceptions. LORD STOWELL suggested that an enemy alien might be discharged from his enemy character *pro hâc vice* if he entered the realm under a flag of truce, a cartel, a pass, or some other act of public authority capable of putting him in the King's peace. *The Hoop, supra.* In the case of *The Möwe* (1914), 84 L. J. P. 57, SIR SAMUEL EVANS laid down the rule that an enemy alien claiming any protection, privilege, or relief under the Hague Conventions of 1907 should be entitled to appear as claimant and argue his claim before the prize court. There is considerable authority for the proposition that an enemy alien may sue *en autre droit, e. g.,* as administrator or executor. *Richfield* v. *Udal* (1679), Carter 48, 191; 1 WILLIAMS ON EXECUTORS, (6 Am. ed.) 269, 270 note. In at least one instance an enemy alien has been admitted to prove a debt under a commission of bankruptcy in order to protect his right to a dividend. *Ex parte Boussmaker* (1806), 13 Ves. 71. By all odds the most important exception is the rule, long established, that an enemy alien may sue in the King's courts if he is in the realm by license of the crown. *Wells* v. *Williams* (1697), 1 Ld. Raym. 282; 1 BAC. ABR., (5 ed.) 83, 84. License may be either express or implied. It was implied from the fact of registration under the Aliens Registration Act and Order of 1914. *Princess Thurn and Taxis* v. *Moffitt* [1915], 1 Ch. 58. And the license implied from such registration was not revoked but on the contrary was strengthened by internment. *Schaffenius* v. *Goldberg* [1916], 1 K. B. 284. It has been suggested that license would probably be implied from the circumstance that an enemy alien, in pursuance of prescribed procedure, had applied for and been granted exemption from internment on condition. PICCIOTO, 27 YALE LAW JOUR. 169. In brief, it would seem that, as regards enemy subjects residing or carrying on business in the realm, the number to whom the courts are closed under modern conditions has become almost negligible.

As regards enemy subjects residing or carrying on business in other countries, it is by no means universally true that they are denied a *persona standi in judicio.* In the first place, the test of enemy character is place of residence or business rather than nationality. *Porter* v. *Freudenberg, supra.* See 16

MICH. L. REV. 256. Thus an action has been maintained by a partnership carrying on business in an allied country, although one of the partners was an enemy subject residing in an allied or neutral country. *In re Mary Duchess of Sutherland* (1915), 31 T. L. R. 248, 394. See *Janson* v. *Driefontein Consolidated Mines Ltd.* [1902], A. C. 484, 505. In the second place, enemy subjects residing or carrying on business in an enemy country may sometimes be joined as co-plaintiffs as a matter of form where the action in substance is brought to protect the rights of English subjects. In *Mercedes Daimler Motor Co.* v. *Maudslay Motor Co.* (1915), 31 T. L. R. 178, a patent had been vested jointly in an English company and a German company by a deed which provided that the English company should have the sole right of bringing actions for infringement and might join the German company in such actions as co-plaintiff. An action was allowed to proceed in the name of the two companies on the ground that it was in substance for the protection of the English company. In *Rombach Baden Clock Co.* v. *Gent & Son* (1915), 84 L. J. K. B. 1558, a German subject resident in Germany and his two sons, one a German subject resident in England, and the other a naturalised Englishman, had carried on a partnership business in England. After the outbreak of war the naturalised Englishman commenced proceedings for dissolution and was appointed receiver. He was permitted in the principal case to bring in action in the name of the firm to recover a debt due the partnership.

The significance of the recent decision of the House of Lords in *Rodriguez* v. *Speyer Brothers* (1918), 88 L. J. K. B. 147, may be adequately appreciated in the light of the authorities reviewed above. In this case the plaintiff firm was a partnership of six persons one of whom was a German subject resident in Germany. The firm had carried on a banking business in London before the outbreak of war. The dissolution of the firm by the outbreak of war made it necessary to get in the assets and wind up the partnership affairs. An action was brought in the name of the firm to recover a debt due from the defendant. Judgment was signed against the defendant in default of appearance. It was attempted to have this judgment set aside on the ground that one of the plaintiffs was an enemy alien and so incompetent to sue in the King's courts. The House of Lords decided, by a vote of three to two, that the rule against the bringing of actions by enemy aliens did not apply.

The majority recognized the general rule. "There is no doubt that, as a general rule, an alien enemy cannot bring an action in the King's Courts as plaintiff, although he may, of course, be made a defendant. The rule seems to have its origin in two considerations. First, that the subject of a country then at war with the King is, in this country, unless he be here with the King's permission, *ex-lex,* and that he cannot come into the King's Courts to sue any more than could an outlaw; and, secondly, that the King's Courts will give no assistance to proceedings which, if successful, would lead to the enrichment of an enemy alien and therefore would tend to provide his country with the sinews of war." Per LORD CHANCELLOR FINLAY, 88 L. J. K. B. 147, 151. The general rule was conceived by the majority to rest fundamentally

upon public policy. VISCOUNT HALDANE pointed out that courts are guided by public policy in applying rules of at least three different types: (1) the public policy involved may never have crystallised into a definite or exhaustive set of propositions and will control only where the particular circumstances disclose the mischief which the policy seeks to prevent, *e. g.*, the rule as to wagers in the days when wagers were enforced; (2) the public policy involved may have partially precipitated itself into definite rules of law but the rules have remained subject to the moulding influence of the real reasons of policy from which they proceeded, *e. g.*, the rule as to covenants in restraint of trade; (3) the public policy involved may have become completely crystallised in definite and exhaustive rules of law which can be changed only by statute, *e. g.*, the rule against perpetuities. The Lords were divided in opinion as to whether the general rule that an enemy alien cannot sue in the King's courts should be placed in the second or in the third category above. LORD CHANCELLOR FINLAY, VISCOUNT HALDANE, and LORD PARMOOR held the opinion that it should be placed in the second category. Consequently, when confronted with a situation in which the application of the rule would have done more harm to British subjects or friendly neutrals than to the enemy, they found no difficulty in recognizing an exception and permitting the enemy alien to be joined as a co-plaintiff in order to get in the partnership assets. The "balance of public convenience" was distinctly in favor of making an exception to the general rule.

LORD ATKINSON and LORD SUMNER, on the other hand, regarded the rule as belonging to the third category. In their opinion the enemy alien's incapacity to sue is a well established personal disability depending neither upon the nature of his claim nor upon the result of his suit, if successful, in enriching him or benefiting his country. "This rule of our law, like many other of our rules of law, was, no doubt, originally based upon and embodied certain views of public policy; but in this case, as in many others, the principles of public policy so adopted have, as numerous authorities conclusively show, crystallised, as it were, into strict and rigid rules of law to be applied, to use LORD STOWELL'S words, 'with rigour.' If that be so, as I think it clearly is, then the cases establish that it is wholly illegitimate for any judicial tribunal, which may disapprove of the principles of public policy so embodied in the rigid rule, to disregard that rule in any particular case and base its decision on other principles of public policy of which it more approves. To do so would be to usurp the prerogative and powers of the Legislature, since it is the function of the Legislature, not of judicial tribunals, to discard the principles embodied in such rules, and in its enactments embody others which it prefers." Per LORD ATKINSON, 88 L. J. K. B. 147, 163. "I think that it would be difficult to find another rule so little qualified over so many centuries. When first we hear of it, not long after the beginning of recorded decisions, it was already clear. We never find it emerging from doubt into certainty under the influence of successive decisions, if that is what is meant by 'crystallising'; it has always been as certain as language could make it, as curt as the Commandments. It has never been doubted; the current of decision has run strong and steady and always the same way. It

has always been a rule of personal disability." Per LORD SUMNER, 88 L. J. K. B. 147, 176.

LORD SUMNER'S choice of a metaphor was not exactly a happy one. In the light of the authorities reviewed briefly at the beginning of this note, it would seem that the ancient rule as to enemy alien litigants could have been more appropriately presented as an obstruction which has been yielding gradually to the eroding current of a more liberal principle. Looking at the question from this point of view, the real significance of the decision rendered by the majority in *Rodriguez* v. *Speyer Brothers* becomes apparent. Not only does the decision add another exception of considerable importance to a rule that is already well on the way to being engulfed in its exceptions, but it establishes beyond peradventure that the rule is not rigid and that it remains subject to the moulding influence of the real reasons of public policy from which it has proceeded. In effect, the eroding process is approved and may continue unobstructed in the future.

E. D. D.